92-1040

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1992

James Barber, et al.
Petitioners,

v.
Michael Horsey,
individually, et al.
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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DATE: November 30, 1992

ISSUES PRESENTED

The United States Supreme Court should grant certiorari for the following reasons:

1. The U.S. Court of Appeals for the Third Circuit ruling below is in direct conflict with precedent of the court of last resort for the Commonwealth of Pennsylvania on an issue of interpretation of state law incorporated into a federal statute on almost identical facts. See **Bentman** v. **Seventh Ward Democratic Executive Committee** 421 PA 188, 218 A.2d 261 (1966).

2. The holding below of the U.S. Court of Appeals for the Third Circuit conflicts with the holding of the U.S. Supreme Court in the lower courts refusal to apply the analysis of either **Erie Ry. Co** v. **Tompkins** 304 U.S. 64 (1938) or **Wilson** v. **Garcia** 472 U.S. 261 (1985).

3. The holding below of the U.S. Court of Appeals for the Third Circuit conflicts with the numerous holdings of the U.S. Supreme Court in the lower courts refusal to find that the denial of voting rights won in a state run party

primary is conduct taken under color of state law for the purposes of the Federal Civil Rights Law, 43 USCS §1983, §1988. See **Nixon** v. **Herndon** and other cases cited infra.

4. The application of the **Erie** Doctrine to the definition of "under color of state law" is one of first impression. Alternatively, the application of the standards of **Wilson** v. **Garcia** 471 U.S. 261 (1985) to the definition of "under color of state law" is need of clarification as demonstrated by the Third Circuit's refusal to discuss the case. Both legal precedents and their interplay with the Federal Civil Rights law are of major importance requiring resolution by the United States Supreme Court.

Issues on the merits to be presented include:

1. Were Respondents Michael Horsey individually and Robert Brady on behalf of Philadelphia County Democratic Executive Committee acting under color of state law when they deprived Appellants of their Free Speech and Equal Pro-

tection rights to cast political ballots? Answer: Affirmative.

2. Does the line of U.S. Supreme Court precedent from **Erie Ry. Co** v. **Tompkins** 304 U.S. 64 (1938) through **Wilson** v. **Garcia** 472 U.S. 261 (1985) with its standard for 42 USCS §1988 require that the Pennsylvania Supreme Court case of **Bentman** v. **7th Ward Democratic Executive Committee** 421 PA 188, 218 A, 2d 261 (1966) be incorporated as binding precedent in determining color of state law? Answer: Affirmative.

3. Alternatively, under federal law were Respondents acting in with conduct fairly attributable to state action so as to constitute action under color of state law; or did Respondents engage in a symbiotic relation in performing a government function sufficient to create color of state law? Answer: Affirmative.

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Barber et al. v. **Horsey et al.** USDC ED PA Civil # 91-4265 Memorandum Opinion entered December 4, 1991 and **Barber et al.** v. **Horsey et al.** US Third Circuit Court of Appeals Appeal # 91-2104 Memorandum Opinion filed July 17, 1992 and Denial of Rehearing dated August 31, 1992 are not officially reported.

STATEMENT OF JURISDICTION

Jurisdiction in the District Court was original jurisdiction over a federal civil rights claim, 42 USCS §1983 and 42 USCS §1988, and 28 USCS §1331 and 28 USCS §1343. The order of the District Court was entered on December 4, 1991.

Appellate jurisdiction to the Third Circuit Court of Appeals is based on a civil appeal from a judgment that is final as to all parties, 28 USCS §1291 and 28 USCS §1294. The order denying the appeal was filed on July 17,

1992. The order denying the motion for re-hearing was dated August 31, 1992.

The United States Supreme Court may grant certiorari to a U.S. Circuit Court of Appeals on a civil appeal pursuant to 28 USCS §1254.

I hereby certify that to the best of my knowledge and belief, the judgment in this matter is a final judgment as to all parties in accordance with 28 USCS §1291.

Robert J. Mulligan Esq.
Attorney for Appellants
James Barber et al.

TEXT OF U.S. CONSTITUTION

AMENDMENT 1

Religious and political freedom.
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 14

Section 1. Citizens of the United States.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. Power to enforce amendment.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TEXT OF FEDERAL STATUTES

28 USCS §1254. Courts of appeals; certiorari; certified questions
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions

are desired, and upon such certification the Supreme Court may give binding instruction or require the entire record to be sent up for decision of the entire matter in controversy.
(June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P.L. 100-352, § 2(a), (b), 102 Stat. 662.)

28 USCS §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].
(June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951 ch 655. § 48, 65 Stat. 726; July 7, 1958, P.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, P.L. 97-164, Title I, Part A, § 124, 96 Stat. 36.)

28 USCS §1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
(June 25, 1948, ch 646, § 1, 62 Stat. 930; July 25, 1958, P.L. 96-486, § 2(a), 94 Stat. 2369.)

28 USCS §1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS § 1985];
(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
(3) To redress the deprivation, under color of any State law, stature, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States of by and Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--
(1) the District of columbia shall be considered to be a State; and
(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(June 25, 1948, ch 646, § 1, 62 Stat. 932; Sep. 3, 1954 ch 1263. § 42, 68 Stat. 1241; Sept. 9, 1957, P.L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, P.L. 96-170, § 2, 93 Stat. 1284.)

28 USCS §1652. State laws as rules of decision

The laws of the several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948 ch 646. § 1,62 Stat. 944.)

42 USCS §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R.S. §1979; Dec. 29, 1979, P.L. 96-170, 1, 93 Stat. 1284.)

42 USCS §1988. Proceedings in vindication of civil rights; attorney's fees

(a) The jurisdiction in civil and criminal matters conferred on the district courts by the provision of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a crimi-

nal nature in the infliction of punishment on the party found guilty.

TEXT OF STATE STATUTES

25 P.S. §2837. County committees; rules; other party officers

There may be in each county a county committee for each political party within such county, the members of which shall be elected at the spring primary, or appointed, as the rules of the respective parties within the county may provide. The county committee of each party may make such rules for the government of the party in the county, not inconsistent with law or with the State rules of the party, as it may deem expedient, and may also revoke, alter or renew in any manner not inconsistent with law or with such State rules, any present or future county rules of such party. No such rules shall be effective until a certified copy thereof has been filed in the office of the county board of elections. The members of all other party committees, and all other party officers whose election is required by the party rules, shall also be elected at the spring primary, in the manner provided by this act. 1937, June 3, P.L. 1333, art. VIII, § 807.

PHILADELPHIA COUNTY DEMOCRATIC PARTY RULES, AS OFFICIALLY FILED WITH PHILADELPHIA COUNTY BOARD OF ELECTIONS PURSUANT TO 25 P.S. §2837 (Relevant Portions).

Rule I Article 1. Any qualified elector, who is duly registered as a member of the Democratic party, shall be entitle to vote for Democratic candidates for party offices, delegates and alternate delegates to conventions and nominees for public offices at the primary elections, provided for by law.

Rule III Article 1 Election of County Committeeman and Ward Officers

Section A. The County Committeeman and all officers of the Ward Committee shall be elected at the time the new Ward Committee is organized on the third Monday succeeding the Primary Election, unless otherwise provided for in the rules.
Section B. At the Spring Primary there shall be elected in each division two persons, who shall serve, on and after the third monday succeeding their election, as members of the Ward Committee in which such division may be situated.

Article 2 Section B. The election of members of the County Committee shall be held on the third Monday succeeding the Primary Election at which the members of the Ward Committee were elected, unless otherwise provided for in the rules.
Section C. Each Ward Committee shall at the time of its re-organization elect, not necessarily from its own membership, one representative to the County Committee. Such person, however, must be an elector of the ward he is to represent.

Rule IV Meetings
Article 1 Ward Committee Meetings
Section A. At 8:00 P.M., on the third Monday succeeding the Primary Election at which members of the Ward Committee were elected, all persons claiming the right of membership in the Ward Committee shall meet at the place designated to organize the new Ward committee, unless the newly elected members of the Ward committee are unable to obtain their certificates of nomination to the Ward Committee by twelve o'clock noon of the said third Monday. In such event, the meeting of the Ward Committee shall be delivery of the certificates of nomination to those [sic.] postponed until the Monday evening following the [sic.] entitled to receive the same.

Rule V ORGANIZATION PROCEDURE

Article 1 Procedure in Organizing Ward Committees

Section A. The last preceding County Committeeman of the ward shall be the presiding Chairman at the organizing of the new Ward Committee. ... In the event of the inability or refusal of the previous County Committeeman to act or upon his failure to have notified the Democratic County headquarters of his intention to act, then it shall be the duty of the person who organizes the County Committee to have the preceding Ward Chairman preside, if available and willing to act, and if not, to have the next succeeding officer, etc., until a person is obtained to organize the Ward Committee.

Section B. The Chairman who conducts the meeting for organizing the new Ward Committee shall proceed in regard to the acceptance of certificates of nomination, seating the parties claiming membership in the Ward Committee against whom no contest has been filed, the appointment of acting secretaries, sergeant-at-arms, tellers, in the same manner as provided for in the organization of the County Committee.

Section C. The Chairman shall also handle contests in the same manner as provided for in the handling of contests by the County Committee. The Ward Committee cannot be organized until all contests have been disposed of.

Section D. All contests must be disposed of and the Ward Committee organized on or before the Wednesday preceding the Monday evening on which the County Committee is to be organized.

Section E. Failure on the part of any Ward Committee to organize at this time and to elect a County Committeeman shall constitute a vacancy of a County Committeeman from the Ward. In such cases, the election of a County Committeeman, as well as the organization of the Ward Committee, shall be referred to the Committee on Organization of the County Committee. This failure shall not be considered as a contest nor prevent the organization of the County Committee.

Section F. After all contests have been heard by the Contest Committee, and all duly elected members have been seated, the meeting shall proceed with the election of officers in the manner as hereinafter set forth for the County Committee, with the exception of the officers to be elected and the order in which they are to be elected.

Section G. The officers to be elected and the order in which they are to be elected are: The County Committeeman and the Permanent Chairman....The Permanent Chairman having been elected, the new Permanent Chairman shall then proceed to conduct the election of the remaining officers: First, Second and Third Vice Chairmen, Secretary, Assistant Secretary, Treasurer and Assistant Treasurer.

Section H. All of the above offices must be elected from the membership of the Committee with the exception of the County Committeeman....

Article 2 Procedure in Organizing County Committee

Section E. All contests having been decided, and those entitled to membership in the County Committee having been seated, the Committee shall them proceed with the election of the officers of the County Committee and the completion of its organization. The Committee shall proceed to the nomination and election for the office of County Chairman. Should there be more than one person nominated, the voting shall proceed in accordance with the rules hereinafter set forth. The tellers shall tabulate and record the votes, as cast by the members. After the tellers have agreed, the Chairman shall announce the results of the voting and declare the one who received the highest number of votes to be elected Chairman of the County Committee. ...

Rule XI VACANCIES

ARTICLE 1 METHOD OF FILLING

SECTION A. Vacancies existing or occurring on the Democratic ticket after the date of a Primary, or created after a Primary by the death, resignation or removal from office of an incumbent elected official, and nominations for candidates to be voted for at special elections to fill vacancies when, under the Election Code of 1937 and supplements and amendments thereto, a primary nomination is impossible (i.e. when special elections are not held at the time of regular elections and when such vacancy occurs or exists within (60) days of the regular primary antecedent to such regular election) shall be filled as follows: In the case of county and city officers, by the County Executive Committee; in the case of members of Congress, delegates to the National Convention, State Senators and Councilmen, upon the recommendation of the District caucus in which the vacancy exists or happens. In the case of State Representatives where the district is composed of one ward, the vacancy shall be filled on the recommendation of the ward Committee at a special meeting held for that purpose. Where more than one ward comprises the legislative district, the vacancy shall be filled at a joint meeting of all ward committees in the said legislative district. In the case of members of the State Committee the vacancy shall be filled by a caucus of the Senatorial district in which the vacancy exists.

Section B. All other vacancies, inclusive of those for which a special election is required to fill vacancies in the office of Representative in Congress, Senator and Representative in General Assembly and member of City Council, for which the law provides that candidates therefore shall be nominated by political parties by means of nomination certificates, shall be filled upon the recommendation of the district caucus in which the vacancy exists or happens, as hereinafter provided.

STATEMENT OF CASE

PROCEDURAL HISTORY

Petitioners James Barber et al. filed a federal civil rights complaint, pursuant to 28 USCS §1343, with the Eastern District of Pennsylvania on July 3, 1991 alleging that the actions of Respondents Michael Horsey individually and Democratic City Committee have caused and continue to cause the destruction of the Equal Rights of Free Speech and Free Assembly and One Person One Vote possessed by the Petitioners Barber et al. as guaranteed by the First Amendment and Fourteenth Amendment of the United States Constitution in violation of 42 USCS §1983. The complaint seeks damages from Defendant Horsey and an injunction against Robert Brady on behalf of Philadelphia County Democratic Executive Committee.

Respondents filed a joint motion to dismiss under F.R.C.P. 12(b) on the grounds that the alleged fraudulent acts of Respondent Horsey and their ratification by Respondent

Democratic City Committee were not under color of state law as defined in 42 USCS §1983.

On December 27, 1991, U.S. District Judge Newcomer granted the motion and dismissed the case without further proceedings. Petitioners Barber et al. then appealed.

On June 23, 1992, the above matter was referred to a three judge appeal panel on the briefs alone pursuant to Third Circuit Local Rule 12(6). The decision, written by Judge Hutchinson, was filed by the panel on Friday, July 17, 1992 denying the appeal. From that appeal panel ruling, Petitioners Barber et al. were granted an extension of time by order dated August 4, 1992 and subsequently filed a motion for rehearing and a suggestion for an en banc hearing on August 14, 1992.

On August 31, 1992, the motion for rehearing and request for en banc hearing were denied. Plaintiffs James Barber et al. now petition the United States Supreme Court for certiorari.

STATEMENT OF FACTS

Petitioners James Barber et al. were elected Democratic committeepersons in the 6th Ward in Philadelphia in the Spring primary election of 1990.

The Democratic Party Rules provide that the election of new ward officers for a four year term is to take place at the ward reorganization meetings which is held on the third Monday after the election of committeepersons. The party rules regarding the selection of ward committeepersons and county committeepersons (i.e. ward leaders) are incorporated into the Pennsylvania Election Code as law, 25 P.S. §2837. In this case the ward reorganization meeting took place on June 4, 1990 at 8 p.m. At this first official meeting of the 6th Ward Democratic Committee after the election, Petitioners Barber et al. were present but were denied the opportunity to vote for a new ward leader and other ward officers when Respondent Michael Horsey, who was conducting the meeting,

proclaimed himself reelected as ward leader without allowing the Petitioners and their allied committeepersons to vote as required by the party rules. Respondent Horsey refused to permit the elected Petitioners James Barber et al. and a plurality of the elected committeepersons present to vote for ward officers. After proclaiming himself 6th Ward Democratic Ward Leader, Respondent Horsey then appointed the other ward officers by "Royal Fiat" without an election in violation of and the Pennsylvania Election Code, Democratic Party rules and state law.

If the Petitioners Barber et al.'s votes been counted on June 4, 1990, Respondent Horsey would not have become 6th Ward Democratic Ward leader nor would the other purported 6th Democratic ward officers have been chosen. Instead candidates whom the Petitioner committeepersons supported would have been elected instead. In particular, Petitioner James Barber would have

been elected Democratic Ward Leader of the 6th Ward.

When Petitioners petitioned Respondent Democratic City Committee to overturn the action of Respondent Horsey and hold an election under the Democratic Party Rule's incorporated into Pennsylvania law, Respondent City Committee refused and certified Respondent Horsey as 6th ward leader. In short Respondent Horsey stole an election by proclaiming himself reelected as ward leader.

RELATED CASES NONE.

PETITIONERS BARBER ET AL. PETITION IN SUPPORT OF GRANTING CERTIORARI TO THE UNITED STATES SUPREME COURT

ARGUMENT

1. INTRODUCTION

There is no legal case of more exceptional importance than that which defends our most basic political liberties from corruption that would destroy the voice of the vote. Such is the case at bar of **Barber** v. **Horsey**.

The facts of the case are straightforward. Plaintiffs were chosen by Democratic voters to be local Democratic committeepersons at the state run publicly held primary election in Pennsylvania in the Spring of 1990.

Party committeeperson are chosen at a single election in Pennsylvania's closed primary. They are elected two per precinct, called "divisions" in Philadelphia, for a term of four years as prescribed by the Democratic Party rules which are incorporated into the Pennsylvania State Election Code, 25 P.S. §2837, and which have the force of law. The rules of all

parties on the ballot are on file with the county boards of election as public record, 25 P.S. §2837.

The elected committeepersons, two per division, meet in their respective wards on the Monday night three weeks after their election to cast the vote to chose the ward leader, officially called the county committeeperson. The ward leader is a politically powerful individual. Among the official duties of the ward leader are to cast a vote with other ward leaders for filling any candidate vacancies which occur between the primary and general elections, presiding at the official ward reorganization meeting at which the committeepersons are formally seated, as well as the usual functions of distributing election day monies and voting for endorsements of candidates for all offices.

When plaintiffs and other elected committeepersons assembled at the first meeting of Philadelphia's 6th Ward to elect the Democratic

ward leader and other ward officers, the incumbent ward leader, Defendant Michael Horsey, staged a coup d'etat and chose himself and the other ward officers without a vote, contrary to the rules of the Democratic Party which are incorporated into state law by the Pennsylvania State Election Code, 25 P.S. §2837.

The election was not merely stolen, it was destroyed. Plaintiff committeepersons brought suit in U.S. District Court to regain their voting rights under the Federal Civil Rights Act. When faced with the perversion of democracy, the U.S. District Court declared that the remedy for such misconduct was beyond the purview of the federal courts because the action was beyond "color of state law" under the federal civil rights statute, 42 USCS §1983. A three judge panel of the third circuit affirmed. Motions for rehearing and for an en banc hearing were denied.

When the court below sanctions such corruption by refusing to remedy it, and our funda-

mental political liberties suffer as a result, the case cries out for just review at the highest level. As the United States Supreme Court has written:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear.... The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. **Reynolds** v. **Sims** 377 U.S. 533 at 561-562 (1964)

The trunk of the American tree of Liberty is the federal Civil Rights statute. If the federal civil rights statute was not designed to defend our most fundamental of rights, namely accurate political representation, then it becomes a hollow branch on which to rest any other right. Without judicial defense of political voting rights of those chosen directly by the people at a basic level, all other po-

litical civil rights wither like rotted parchment.

2. THERE EXISTS A DIRECT CONFLICT IN PRECEDENT BETWEEN THE PENNSYLVANIA SUPREME COURT AND THE FEDERAL THIRD CIRCUIT COURT OF APPEALS.

The Pennsylvania Supreme Court gave its interpretation of under color of Pennsylvania state law in its civil rights decision in **Bentman** v. **Seventh Ward Democratic Executive Committee** 421 Pa. 181, 218 A. 2d 261 (1966), on facts identical to those at bar. In **Bentman**, a Democratic ward leader in Philadelphia refused to seat committeepersons or to let them vote at the ward reorganization meeting. The Pennsylvania Supreme Court ruled that a civil rights violation had been made out. The court wrote in support of its holding:

> Insofar as a political party performs statutorily imposed public functions and to the extent that its actions constitute state action, the internal organization of such political party is a matter of such concern to the public as to make it subject to constitutional limitations and judicial restraints. When the internal organization

> of a political party directly affects its performance of such public functions then not only may the judiciary intervene but it must intervene....
> **Bentman** v. **Seventh Ward Democratic Executive Committee** 421 Pa. 188 at 196 (1966)

The opinion of the appeals panel here readily recognizes the conflict between the Pennsylvania Supreme Court and the later ruling of the U.S. District Court in **McMenamin** v. **Philadelphia County Democratic Executive Committee of Philadelphia** 405 F. Supp. 998 (ED PA 1975). The appeals panel equated **McMenamin** with the Third Circuit case **Lynch** v. **Torquato** 343 F.2d 370 (CA3 1965) which the panel found controlling. The panel failed to distinguish **Lynch** v. **Torquato** which approved the discretion of political parties to write rules from **McMenamin** which improperly denied civil rights caused by a violation of legally adopted rules.

As the appeals panel noted, this case is ripe with conflicting interpretations of the same statutory language by the Pennsylvania Supreme Court and the U.S. District Court in **McMenamin**:

> It is unfortunate that there is a conflict between the decisions of the highest court of the Commonwealth of Pennsylvania and the decisions of this Court concerning federal civil rights law. Nevertheless, this panel is controlled by the decisions of this Court concerning federal law and not by differing interpretations advanced by state courts.
> [Page 4 of the Third Circuit panel opinion at Appendix R.66-67]

The federal appeals panel here chose not to respect Pennsylvania's definition of the extent of its own state law. The federal courts below gave the civil rights statute a crimped and narrow interpretation instead by dismissing the current suit on Defendant Horsey's Rule 12 motion before an answer was filed. Such direct conflict of such important legal issues by two such high courts mandates U.S. Supreme Court review.

3. THE FEDERAL COURT OF APPEALS FOR THE THIRD CIRCUIT FAILED TO FOLLOW U.S. SUPREME COURT PRECEDENT OF ERIE V. TOMPKINS WHICH REQUIRES THE INCORPORATION OF STATE LAW DEFINITION OF UNDER COLOR OF STATE LAW UPON THE FACTS OF THIS CASE.

Not only do our political rights disappear in the appeals panel ruling but likewise so does the concept of federalism vanish with the constrained interpretation of "under color of state law." The definition of state law is inherently a state issue. Such is the basic holding of the famous decision in **Erie Ry. Co** v. **Tompkins** 304 U.S. 64 (1938). The determination of what conduct constitutes "under color of state law' is likewise heavily, if not totally, dependent on the definition of state law.

> The Erie rule remains a vital expression of the federal system and the concomitant integrity of the separate States.
> **Ferens** v. **John Deere Co.** 494 U.S. 516, 108 L.Ed.2d 443, 110 S.Ct. 1274 (1990)

The conflict of outcome between the Pennsylvania Supreme Court and the U.S. Third Circuit Court of Appeals ruling here is precisely the type of evil that **Erie** was designed to avoid.

> In essence, the intent of [the Erie] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.
> **Guaranty Trust Co.** v. **York** 326 U.S. 99, at 109, 89 L.Ed. 2079, 65 S.Ct. 1464, 160 ALR 1231 (1945).

Although most frequently applied to diversity cases, the **Erie** doctrine applies any time that a state substantive law is incorporated into a federal statute. The U.S. District Court below erroneously ruled that the **Erie** doctrine applies only to diversity cases (Appendix R. 48). The Third Circuit Court of Appeals reasoned that there was not state law incorpo-

rated here (App. R.67). Contrary to the ruling below here, the U.S. Supreme Court has used the **Erie** doctrine in nondiversity cases:

> [I]t is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law. See, Hart & Wechsler, the Federal Courts and the Federal System (1953) 690-700. Thus the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.
> **Wichita Royalty Co.** v. **City National Bank** 306 U.S. 108 (1939).

In **Commissioner** v. **Bosch**, 387 U.S. at 456 (1966), the U.S. Supreme Court held:

> This is but an application of the rule of **Erie R. Co.** v. **Tompkins**, **supra**, where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, **viz.**, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. **Commissioner** v. **Bosch**, 387 U.S. at 456 (1966).

As Justice Scalia has noted in a more recent concurring opinion, the **Erie** doctrine is not confined merely to diversity cases but applies

to other federal cases in which state law is incorporated into federal statutes:

> Contrary to the **DelCostello** Court's claim, however, neither our decision in **Erie R. Co.** v. **Tompkins**, 304 U.S. 64 (1938), nor the Rules of Decision Act scholarship underlying it in any way required that change. Neither remotely established that statute applies only in diversity cases. See Hill, The **Erie** Doctrine in Bankruptcy, 66 Harv. L. Rev. 1013, 1033-1034 (1953); see also **DelCostello** v. **Teamsters** [462 U.S.151 (1938)] at 173, n.1 (STEVENS, J., dissenting)(noting that "'the [Act] itself neither contains nor suggests ...a distinction '" between diversity and federal-question cases, quoting **Campbell** v. **Haverhill**, 155 U.S. 610, 616 (1895); Friendly, In Praise of **Erie** -- And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 408, n. 122 (1964) (characterizing the view that **Erie** requires application of state law only in diversity cases as an "oft-encountered heresy"].
> **Agency Holding Corp.** v. **Malley-Duff & Assocs.** 483 U.S. 143 at 165, ftnt. 2. (1987).

The leading case from the second circuit, - **Maternally Yours** v. **Your Maternity Shop** 234 F. 2d 538, 540 n.1 (CA2 1956)[1] has been cited with

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[1] Despite the footnote's claim that the application of **Erie** in the **Maternally Yours** case was unnecessary for the disposition of that case, the court nevertheless did apply what it held to be controlling substantive New York state unfair competition law as

approval by both the United States Supreme Court, **Bosch** supra, and the Third Circuit Court of Appeals **Hamilton** v. **Roth** 624 F.2d 1204 at 1210 (1980). Ironically it was the Third Circuit Court of Appeals that gave a very clear expression of the scope of the **Erie** doctrine:

> The principle of **Erie** is that federal courts adjudicating rights conferred by state law must do so through the application of substantive state law. The **Erie** doctrine in no sense varies with the particular basis of jurisdiction through which state-created causes of action make their way into federal court. The **Erie** principle is concerned not with the source of the source of federal jurisdiction, but rather with the source of the rights being adjudicated: state-created rights must be determined in accordance with state law....The concerns of forum shopping and countervailing federal considerations are, of course, relevant to the initial determination whether **Erie** requires the application of a state rule by a federal court adjudicating a state law claim. But having once made the determination that state law must be applied, the mere assertion of a different jurisdictional basis cannot require either a redetermination of those factors, or a different result.
> **Hamilton** v.**Roth** supra at 1210.

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incorporated through a federal statute in order to sustain the lower court's injunction.

The Federal courts cannot rewrite the scope of state law. Federalism means a power sharing between the states and the federal government. It would be a rebuke of federalism for the federal courts to contract the scope of the civil rights granted by the state supreme court precedent contrary to the larger purpose of civil rights as expressed in **Sullivan** v. **Little Hunting Park** 396 U.S. 229, 405. S. Ct. 400, 242 L.Ed.2d 386 (1969).

The appeals panel opinion does not resolve the conflict between Pennsylvania's court of last resort and the federal courts. Instead the appellate opinion engages in the tautology that the federal civil rights law is federal civil rights law and does not discuss whether the federal law incorporates any state substantive law. According to the appeal panel reasoning, a federal court can dictate to a state what the definition of state law is when the state law in incorporated into a federal statute.

4. THE COURTS BELOW REFUSED TO FOLLOW THE UNITED STATES SUPREME COURT PRECEDENT OF WILSON v. GARCIA, 471 U.S. 261 (1985) WHICH REQUIRES THE INCORPORATION OF STATE LAW DEFINITION OF UNDER COLOR OF STATE LAW.

The legal conclusion that Pennsylvania's highest court precedent definition of "under color of state law" should be adopted or "borrowed" into the federal Civil Rights Law derives not only from **Erie**, but has statutory support in the civil rights statute itself, 42 USCS §1988, which reads in relevant part:

> **Sec. §1988. Proceeding in vindication of civil rights; attorney's fees**
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS,"... for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is

> not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause....

The appeals panel did not discuss the above statute in its opinion. Such an important part of the civil rights statute cannot be avoided especially a statute so recently reviewed during the 1991 amendments by the United States Congress.

The recent major United States Supreme Court precedent, **Wilson** v. **Garcia** 471 U.S. 261 (1985-), interpreted this statute, as well as set down the standards for "borrowing" a state statute or precedent into federal law. In **Wilson** the United States Supreme Court held that §1988 of the Federal Civil Rights Act provided a specific standard for deciding whether state law was incorporated into federal law. In ruling that state personal injury statutes of limitation applied to Federal Civil Rights cases, the U.S. Supreme Court wrote:

> Rooted as it is in the expectations of Congress, the "state-borrowing doctrine" may not be lightly abandoned. We have de-

> scribed federal borrowing as "a closely circumscribed exception," to be made "only 'a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" **Reed v. United Transportation Union**, 488 U.S. 319, 324 (1989), quoting **DelCostello**, 462 U.S., at 172.

The **Wilson** analysis begins with an examination of whether the federal statute preempts state law or provides an explicit statutory definition. No specific definition of "under color of state law" is given in the Federal Civil Rights statute. By its very nature, it is a contradiction in terms to incorporate 50 different state statutory laws into federal law without a major incorporation of state law precedent to define the scope and extent of those laws.

The second step in the **Wilson** standard is to determine if the state law precedent is consistent with the purpose of the federal statute.

> In enacting 42 U.S.C. §1988 Congress determined that gaps in federal civil rights acts should be filled by state law, as long as that law is not inconsistent with federal law....This tradition of borrowing analogous limitations statutes,... is based on a congressional decision to defer to "the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." [citing **Wilson** v. **Garcia** supra.] **Hardin** v. **Straub** 490 U.S. 536 at 538 (1988)

Certainly Pennsylvania's protection of voting rights won at its state run primary are a furtherance of federal First Amendment right of political Free Speech and Fourteenth Amendment right of Equal Protection of political representation.

The final step in the **Wilson** approach is to examine that there is no conflict between the state law precedent and the federal statute. Plainly the **Bentman** precedent of the Pennsylvania Supreme Court is not in conflict with the purposes of political Free Speech and Equal Representation mentioned above.

The **Wilson** v. **Garcia** precedent was not examined at all nor were its standards employed by

the federal courts below in the case even thought raised in both appellants' briefs before the U.S. District and U.S. Third Circuit Courts. Because the Third Circuit Court of Appeals did not even attempt to discuss the **Wilson** precedent, the analysis of the court below is flawed and requires U.S. Supreme Court intervention.

The United States Supreme Court must resolve this issue. Certiorari to the United States Supreme Court is clearly needed to resolve such an important issue as to whether a state can expand its definition of under color of state law and its definition of civil rights.

5. ALTERNATIVELY, THE FEDERAL COURT OF APPEALS FOR THE THIRD CIRCUIT FAILED TO FOLLOW THE NUMEROUS U.S. SUPREME COURT PRECEDENTS, INCLUDING SUCH CASES AS NIXON V. HERNDON AND CLASSIC V. U.S., WHICH HOLD THAT PARTY PRIMARY ELECTIONS ARE NOT "PRIVATE AFFAIRS" BUT ARE DONE "UNDER COLOR OF STATE LAW" AS DEFINED BY THE FEDERAL CIVIL RIGHTS LAW.

The appeals panel felt bound by the prior **McMenamin** ruling despite the wealth of U.S. Supreme Court precedent holding that party primaries are not private affairs under the federal civil rights statute, **Smith** v. **Allwright** 321 U.S. 649, 88 L. Ed 987, 64 S.Ct. 757 reh den 322 U.S. 769, 88 L.Ed. 1594, 64 S.Ct 1052 (1944); **Terry** v. **Adams** 345 U.S. 461, 97 L.Ed 1152, 73 S.Ct. 809 reh den 345 U.S. 1003, 97 L.Ed 1408, 735 S.Ct. 1128 (1953); **American Party of Texas** v. **White** 415 U.S. 767 (1974); **Moore** v. **Ogilvie** 394 U.S. 814 (1969); **Williams** v. **Rhodes** 393 U.S. 23 (1968); **Nixon** v. **Herndon** 273 U.S. 536 (1927), 71 L.Ed. 759, 47

S.CT. 466; **Nixon** v. **Condon** 286 U.S. 73 (1932), cited with approval **Reitman** v. **Mulkey** 387 U.S. 369, 87 S.Ct 1627, 18 L.Ed.2d 830 (1967); **Ray** v. **Blair** 343 U.S. 214 (1952). One appeals panel cannot ordinarily overrule another, Third Circuit Internal Operating Procedures 9.1, although conflict with above U.S. Supreme Court precedent would have provided the opportunity. At this stage, only U.S. Supreme Court review can definitively decide this important conflict of the major precedents.

6. CONCLUSION

The case at bar of **Barber et al.** v. **Horsey et al.** and the **McMenamin** precedent, upon which the **Barber** holding is based, should be reviewed and overruled because: A)they ignore numerous U.S. Supreme Court precedents holding that state conducted primaries are under color of state law for civil rights cases; B) **McMenamin** confuses the discretion granted to political parties in **Lynch** v. **Torquado** to make rules with

the denial of civil rights caused by a violation of legally adopted rules; C) **McMenamin** makes no thorough analysis of either 42 U.S. 1988 nor the **Erie** doctrine as required by the U.S. Supreme Court's opinion in **Wilson** v. **Garcia**, supra. The lack of analysis of 1988 or **Erie** alone make **McMenamin** a weak shore upon which to scuttle the vessel of our most valuable and most important civil rights.

Most fundamentally, the **McMenamin** case and the ruling by the appeals panel below ignore the United States Supreme Court often stated precedent that the civil rights statute is to be liberally construed **U.S.** v. **Price** 383 U.S. 787 at 801 (1966). It has become fashionable in some federal courts not to enforce the civil rights laws through the ruse of a narrow construction by splitting the civil rights statute into isolated pieces. The civil rights statute is analogous to the human genome --in totality it has a magnificent structure and purpose. But keep cutting the DNA molecules into smaller

and smaller pieces and you are left not with smaller genes, but no genes at all, only molecule fragments and bare atoms which contain no genetic information or purpose.

Likewise, if portions of the federal civil rights statute are interpreted in isolation, if section 1983 is read apart from 1988, if "under color of state law" is defined without reference to state law as contained in state supreme court precedent, you are left not with smaller civil rights, but no rights at all.

The case at bar is similar to race discrimination cases before 1954. Hair splitting interpretation of language were used to prevent a discussion of the larger right at stake. Just as **Brown** v. **Board of Education** 347 U.S. 483 (1954) integrated the fragmented precedents and statutes into a coherent larger purpose, today so must the civil rights statutes be viewed in the context of political rights and freedoms. There is no question that these political rights for the plaintiff committee-

persons to express their choice, **Lubin** v. **Panish** 415 U.S. 709 at 716 (1974), and cast a ballot, **Reynolds** v. **Simms** 377 U.S. 533 (1964), rank among the most important rights that the judiciary can protect, **Dunn** v. **Blumstein** 405 U.S. 330 (1972).

The district court and appeals panel protestation that they are not endorsing the corruption of our democracy had a distinctly hollow ring in a city where a Liberty Bell once rang proudly. As the oft quoted political maxim recites, "All that is necessary for evil to triumph is for good men to do nothing."[2] The amber waves of grain of a free society will quickly wither if the attack on grass roots political freedom that Defendant Michael Horsey's conduct presents is left unchecked.

It would be historically and tragically ironic that when so many peoples around the world are struggling, fighting and dying for a

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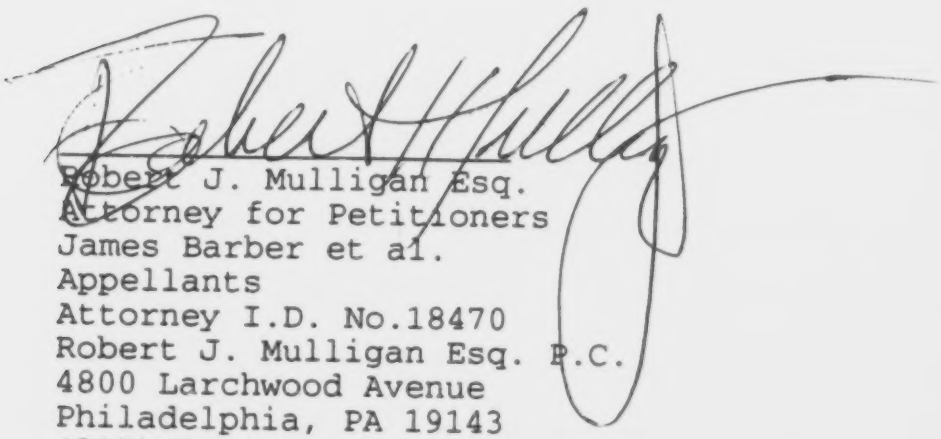
[2] Anonymous but often erroneously attributed to Edmond Burke.

mere taste of democracy, that our federal courts would rule that an appeal of lost political rights is not important enough to be heard, especially when there is so much precedent of the U.S. Supreme Court and Pennsylvania Supreme Court on the one hand, conflicting with the Third Circuit's use of the **McMenamin** line of reasoning on the other.

The bottom line is the **McMenamin** was decided wrongly and should be overruled for not adopting the incorporation of state law analysis for 42 USCS 1988 as put forward in **Wilson** v. - **Garcia**, supra., as well as the closely related doctrine of **Erie Ry. Co.** v. **Tompkins**, all supra.

When the jurisdictional path exists, as it does here, to restrain such an outrageous violation of Petitioners' rights, temerity on the part of the courts to address a "political controversy" becomes an endorsement of wrongdoing.

Certiorari hearing and argument should be granted because the legal issues are too important and the conflict between Pennsylvania's highest state court and the U.S. Third Circuit Court of Appeals too deep to be ignored.



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DATE: November 29, 1992

IN THE
Supreme Court of the United States
February Term, 1993

James Barber, et al.
Petitioners,

v.

Michael Horsey,
individually, et al.
Respondent,

CERTIFICATION OF SERVICE

I, ROBERT J. MULLIGAN ESQ., hereby certify that I have served copies of the APPELLANTS BARBER ET AL. PETITION FOR A WRIT OF CERTIORARI and APPENDIX upon the Appellees Horsey et al. counsel in the above captioned matter, by mailing a copy first class mail on November 29, 1992, addressed to:

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